No. 80-1016

In the Supreme Court of the United States

OCTOBER TERM, 1980

BOISE CASCADE CORPORATION,

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY; SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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Petitioner submits this Reply Brief to the Briefs in Opposition of the Union Pacific Railroad Company and San Pedro, Los Angeles & Salt Lake Railroad Company[1] and of the United States of America to respond to arguments raised for the first time in the Briefs in Opposition.

[1] The Respondent railroads will be referred to in this Reply Brief as the Railroad.

ARGUMENT

1. The Decision of the Court of Appeals Raises Important Questions of Federal Law.

The Railroad's Brief in Opposition attempts to portray the issues in this case as unique and archaic.[2]

The nature and extent of rights granted to railroads under the Act of March 3, 1875, 18 Stat. 482, 43 U.S.C. §§ 934-939 (the Act), is a regular subject of litigation.[3] One question raised in recent cases is whether the United States retains a reversionary interest if a railroad right of way across a school section is abandoned.[4] Although the Act of March 8, 1922, 42 Stat. 414, 43 U.S.C. § 912, seems to resolve that question in the negative except with respect to mineral reservations, it is raised here by the claim of the United States that it has reversionary and subsurface interests in the Railroad's claimed right of way.[5]

The legality and effect of disposition of all or a portion of a railroad's right of way by the railroad or the underlying fee owner is a subject of significant cur-

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[2] Railroad's Brief in Opposition at 6-7.

[3] In the brief time period involved in preparation of this Reply Brief, the following recent cases have been located. **Pollnow v. State of Wisconsin Department of Natural Resources**, 88 Wis.2d 350, 276 N.W.2d 738 (1979); **Zimmerman v. Union Pacific R. Co.**, Utah County District Court, Civil No. 44034 [filed March 18, 1976, judgment March 31, 1977 in favor of railroad]; **Allard Cattle Co. v. Colorado & Southern Ry. Co.**, 187 Colo. 1, 530 P.2d 503 (1974); **Berry Construction, Inc. v. City of Ontario**, San Bernadino Superior Court, Case No. CW 6446 [filed September 3, 1970 and dismissed based upon a settlement on March 8, 1973].

[4] **State of Wyoming v. Andrus**, 602 F.2d 1379, 1384 (10th Cir. 1979).

[5] United States' Brief in Opposition at 4.

rent interest.[6] The issue is presented here as a result of the Railroad's pattern of leasing portions of its right of way to adjacent landowners for non-railroad uses.

The questions presented in this case are worthy of this Court's consideration.

2. THE ACT IS NOT ANALOGOUS TO THE HIGHWAY RIGHT OF WAY ACT OF 1866.

The United States contends that *Central Pacific Ry. Co. v. Alameda County,* 284 U.S. 463 (1932), which held that the Act of July 26, 1866, ch. CCLXII, 14 Stat. 253, had retroactive application to secure a right of way to a highway constructed prior to its passage, supports the decision of the Court of Appeals in this case on retroactivity of the Act. The Brief in Opposition characterizes the terms of the two right of way acts as "indistinguishable." [7]

The Act of 1866, unlike the Act of 1875, was specifically intended to confirm preexisting interests and rights. Sections 9 and 10 of the Act expressly refer to actions undertaken "prior to" and "after passage of this act." [8] The legislative history of the Act of 1866 confirms its retroactive intent.

Senator Sherman of Ohio originally introduced a bill (S. No. 257) in April of 1866 to regulate the occu-

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[6] **Energy Transportation Systems, Inc. v. Union Pacific R. Co., 435 F.Supp. 313 (D.Wyo. 1977). Laiblin, "Insuring Abandoned Railroad Property," The Guarantor, January-February 1981 (Chicago Title Insurance Company).**

[7] **United States' Brief in Opposition at 7.**

[8] **A complete copy of the Act of 1866 is attached as Appendix A.**

pation of mineral lands and to extend the right of preemption to them. The bill was referred to the Committe on Mines and Mining which reported a totally amended bill some weeks later. Senators Stewart of Nevada and Conness of California led support of the bill through its passage in a form almost identical to the Act of 1866.[9]

During the debates, Senator Stewart described the intent of the bill as follows:

> It recognizes the obligation of the Government to respect private rights which have grown up under its tacit consent and approval . . . .
>
> . . . .
>
> . . . In short, it proposes no new system, but sanctions, regulates, and confirms a system to which the people are devotedly attached, and removes a cloud of doubt and uncertainty . . . .

Cong. Globe, 39th Cong. 1st Sess. 3227 (1866). Senator Conness added:

> This bill . . . proposes simply to confirm the title that the people themselves have established everywhere.

Id. at 3233. *See also, Id.* at 3234.

When S. No. 257 was passed, its name was amended to "A bill to legalize the occupation of mineral lands and to extend the right of preemption thereto." *Id.* at 3454. In order to circumvent opposition in the House,

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[9] Cong. Globe, 39th Cong. 1st Sess. 1844, 2851, 3225-3237, 3451-3454 (1866).

the Senate passed the bill again in the form of a complete amendment to H. R. No. 365, which had already passed the House. The House then passed the amended H. R. No. 365 as the Act of July 26, 1866.[10]

During the debates in the House just prior to passage of the Senate amendment, Representative Kasson of Iowa, who opposed the bill, noted that its object was:

> that security shall be given to the possessory titles and interests already vested, under no authority from the United States, but simply through the enterprise and irrepressible zeal which characterize the American people.

Id. at 4052. Representatives McRuer of California, Ashley of Nevada and Higby of California all confirmed that object. *Id.* at 4052-4054. Representative Higby summed up the purpose, stating:

The simplest proposition in the world is con-

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[10] After its passage in the Senate, S. No. 257 was referred to the Committee on Public Lands over the objection of Representatives from the Pacific Coast states. Id. at 3548. Representative Julian of Indiana, the Chairman of the Committee on Public Lands, opposed the bill and kept it in his Committee over the objection of a majority of the members of the Committee. Id. at 4053-4054. Representative Higby of California introduced an identical bill and secured its reference to the House Committee on Mines and Mining. Id. at 3843. Representative Higby had earlier introduced and secured passage of H.R. No. 365 which was an act granting the right of way to ditch and canal owners over the public lands. Id. at 1259, 1332, 3141-3142. When it became apparent to the California and Nevada delegations that Rep. Julian intended to use his position to block passage of S. No. 257 by the House, Senator Stewart's Committee on Public Lands reported a total amendment of H. R. No. 365 by substituting, after the title and enabling clause, S. No. 257. The Senate passed H. R. No. 365 as amended. Id. at 3916, 3951-3952. The House passed amended H. R. No. 365 a few days later just before the close of the Session. Id. at 4017, 4021, 4048-4054.

> tained in this bill. It is but one proposition, and that is to leave the whole mineral district as heretofore, only saying that what the Government has tolerated for fifteen or seventeen years shall now be legalized by the Government.

Id. at 4054.

Boise Cascade has already amply demonstrated that the Act of March 3, 1875 was intended to have prospective application only.[11] Therefore, *Central Pacific Ry. Co. v. Alameda County, supra,* is inapplicable to this case.

3. The Legality of the Railroad's Right of Way is Not In Issue.

The United States' Brief in Opposition suggests that this Court is compelled to find the Act retroactive or the Railroad's occupation of its right of way is illegal.[12] The argument of the United States ignores the fact that since 1905 the lands in question have not been public lands. The Railroad has plainly established a valid 66-foot right of way since 1905 even if one did not previously exist. Boise Cascade has never contended otherwise. Therefore, while the Railroad's rights prior to 1905 might be of some academic curiosity, they are plainly immaterial now. The United States raises the argument only out of concern that if the Railroad does not gain its right of way as a result of the Act, the United States has no subsurface or reversionary interests.

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[11] Petition for Writ of Certiorari at 7-11.

[12] United States' Brief in Opposition at 7-8.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 1981

[13] Boise Cascade has previously filed its Designation of Corporate Affiliates with the Court.

APPENDIX A

14 STATUTES AT LARGE 251, THIRTY-NINTH CONGRESS, FIRST SESSION, 1866.

CHAP. CCLXII. — *An Act granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States.

SEC. 2. *And be it further enacted,* That whenever any person or association of persons claim a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, or copper, having previously occupied and improved the same according to the local custom or rules of miners in the district where the same is situated, and having expended in actual labor and improvements thereon an amount of not less than one thousand dollars, and in regard to whose possession there is no controversy or opposing claim, it shall and may be lawful for said claimant or association of claimants to file in the local land office a diagram of the same, so extended laterally or otherwise as to conform to the local laws,

customs, and rules of miners, and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode with its dips, angles, and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition.

SEC. 3. *And be it further enacted*, That upon the filing of the diagram as provided in the second section of this act, and posting the same in a conspicuous place on the claim, together with a notice of intention to apply for a patent, the register of the land office shall publish a notice of the same in a newspaper published nearest to the location of said claim; and shall also post such notice in his office for the period of ninety days; and after the expiration of said period, if no adverse claim shall have been filed, it shall be the duty of the surveyor-general, upon application of the party, to survey the premises and make a plat thereof, indorsed with his approval, designating the number and description of the location, the value of the labor and improvements, and the character of the vein exposed; and upon the payment to the proper officer of five dollars per acre, together with the cost of such survey, plat, and notice, and giving satisfactory evidence that said diagram and notice have been posted on the claim during said period of ninety days, the register of the land office shall transmit to the general land office said plat, survey, and description; and a patent shall issue for the same thereupon. But said plat, survey, or description shall in no case cover more than one vein or lode, and no patent

shall issue for more than one vein or lode, which shall be expressed in the patent issued.

SEC. 4. *And be it further enacted,* That when such location and entry of a mine shall be upon unsurveyed lands, it shall and may be lawful, after the extension thereto of the public surveys, to adjust the surveys to the limits of the premises according to the location and possession and plat aforesaid, and the surveyor-general may, in extending the surveys, vary the same from a rectangular form to suit the circumstances of the country and the local rules, laws, and customs of miners: *Provided,* That no location hereafter made shall exceed two hundred feet in length along the vein for each locator, with an additional claim for discovery to the discoveror of the lode, with the right to follow such vein to any depth, with all its dips, variations, and angles, together with a reasonable quantity of surface for the convenient working of the same as fixed by local rules: *And provided further,* That no person may make more than one location on the same lode, and not more than three thousand feet shall be taken in any one claim by any association of persons.

SEC. 5. *And be it further enacted,* That as a further condition of sale, in the absence of necessary legislation by Congress, the local legislature of any State or Territory may provide rules for working mines involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent.

SEC. 6. *And be it further enacted*, That whenever any adverse claimants to any mine located and claimed as aforesaid shall appear before the approval of the survey, as provided in the third section of this act, all proceedings shall be stayed until a final settlement and adjudication in the courts of competent jurisdiction of the rights of possession to such claim, when a patent may issue as in other cases.

SEC. 7. *And be it further enacted*, That the President of the United States be, and is hereby, authorized to establish additional land districts and to appoint the necessary officers under existing laws, wherever he may deem the same necessary for the public convenience in executing the provisions of this act.

SEC. 8. *And be it further enacted*, That the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

SEC. 9. *And be it further enacted*, That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed: *Provided, however*, That whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the

public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

SEC. 10. *And be it further enacted*, That wherever, prior to the passage of this act, upon the lands heretofore designated as mineral lands, which have been excluded from survey and sale, there have been homesteads made by citizens of the United States, or persons who have declared their intention to become citizens, which homesteads have been made, improved, and used for agricultural purposes, and upon which there have been no valuable mines of gold, silver, cinnabar, or copper discovered, and which are properly agricultural lands, and the said settlers or owners of such homesteads shall have a right of pre-emption thereto, and shall be entitled to purchase the same at the price of one dollar and twenty-five cents per acre, and in quantity not to exceed one hundred and sixty-acres; or said parties may avail themselves of the provisions of the act of Congress approved May twenty, eighteen hundred and sixty-two, entitled "An act to secure homesteads to actual settlers on the public domain," and acts amendatory thereof.

SEC. 11. *And be it further enacted*, That upon the survey of the lands aforesaid, the Secretary of the Interior may designate and set apart such portions of the said lands as are clearly agricultural lands, which lands shall thereafter be subject to pre-emption and sale as other public lands of the United States, and subject to all the laws and regulations applicable to the same.